NO. 82-1396

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN
Petitioner

-vs-

JESSE JAMES JONES
Respondent

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTER QUESTION PRESENTED

WHETHER A PRE CHARGE PROMISE - INDUCED CONFESSION IS PER SE INADMISSIBLE UNDER THE FIFTH AMENDMENT.

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COUNTER STATEMENT OF FACTS

The respondent accepts the Statement of Facts set forth in Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan.

ARGUMENT

A PRE-CHARGE PROMISE-INDUCED CONFESSION IS PER SE INADMISSIBLE UNDER THE FIFTH AMENDMENT.

The question of admissibility of extra judicial confessions obtained from a defendant in return for a promise to allow him to plead guilty to a lesser crime in not new. Under Michigan law, a defendant can challenge the voluntariness of his statements at a "Walker Hearing". *People* v *Walker*, 374 Mich 333; 132 NW2d (1965) (on rehearing).

In the case at bar, the Circuit Court after a hearing conducted pursuant to *People* v *Walker*, supra, determined that respondent's statement was voluntarily given. (Appendix 32a-44a).

Petitioner claims that the Michigan Supreme Court, in the instant case, has decided a federal question and interpreted the Fifth Amendment in a manner that is in conflict with the decisions of other state courts, federal courts and this Court. (See Petitioner's brief, p. 9, and appendix 1a-11a). Respondent asserts that the decision of the Michigan Supreme Court in the case at bar is not erroneous and is based upon sound authority of prior decisions of the Michigan Supreme Court, various federal courts and this Court. *People* v *Street*, 288 Mich App 406; 284 NW 926 (1939); *People* v *Trombley*, 67 Mich App 88; 240 NW2d 279 (1976); *People* v *George*, 69 Mich App 403; 245 NW2d 65 (1976).

The long-established common-law rule in Michigan regarding the admissibility of extra judicial confessions is clearly set forth in *People* v *Wolcott*, 51 Mich 612; 17

NW2d 78 (1888), *United States* v *Ross*, 493 F2d 771 (CA 5, 1974). *United States* v *Herman* 544 F2d 791 (CA 5, 1977). *Bram* v *United States* 168 US 532; 18 S.Ct. 183; 42 LEd 568 (1897), where the Michigan Supreme Court stated on page 615:

> No reliance can be placed upon admissions of guilt so obtained; for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them."

Michigan's common-law rule pre-dates the decision of this Court in *Bram* v *United States, supra*, where it was held that no person could be compelled to testify against himself pursuant to the Fifth Amendment to the Constitution of the United States. The *Bram* case has long been cited by those seeking to *per se* exclude evidence of extrajudicial confessions. Under the standard set forth in *Bram supra*, it is not the conduct of the officers which is critical but whether the confession itself was free and voluntary.

Arriving at its decision, the Circuit Court relied upon *Missouri* v *Huston*, 537 S.W. 2d 809 (1976) and *Hunter* v *Swenson*, 372 F. Supp 287 (1974) aff'd 504 F 2d 1104 (1974) *cert den* 43 LEd 2d 662 (1975) and determined that under the totality of the circumstances, respondent's statement was voluntary and, therefore, admissible. The Michigan Supreme Court, as previously noted, reversed holding that the statement made by respondent, pursuant to the plea agreement, was *per se* inadmissible.

Respondent further asserts that the *per se* rule of *Bram supra*, finds support in more recent decisions of this Court.

In the recent case of *Hutto* v *Ross*, 429 U.S. 28;30: 97 S.Ct. 202; 50 LEd 2d 194 (1976) this court held that the test of voluntariness depends on the existence of any threats, violence or implied promises. In that case, a defendant's conviction was ultimately affirmed because counsel for the

prosecution made it quite clear that defendant could enforce the terms of the plea agreement whether or not he confessed. In short, the benefit of the bargain was attainable even if he did not confess. Factually, the situation in the case at bar is distinguishable because the benefit was only available to respondent if he confessed.

Respondent asserts that his position also finds support in the statements of this Court in *Shotwell Manufacturing Company* v *United States*, 371 U.S. 341, 83 S.Ct. 448; 9 LEd 2d 357 (1963). There the Court stated at page 347:

> "It is of course a constitutional principle of long standing that the prosecution must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. *Rogers* v *Richmond* 365 U.S. 534, 541, LEd 760 81 S.Ct. 735 "*We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity and where that is the case, such evidence must be excluded under the self-incrimination clause of the Fifth Amendment.* (cases cited, emphasis added)

Another case which is strikingly similar to the case at bar is *Mobley ex rel Ross* v *Merk*, 531 F2d 924 (1976). In that case, a defendant entered into a plea bargain arraignment and pursuant to the agreement gave an incriminating statement prior to the entry of a guilty plea. Defendant reneged on his agreement by refusing to plead guilty and requested a jury trial. The prosecution, naturally, introduced defendant's statement against him. On appeal, the Court noted at page 925:

> "It is undisputed that a plea bargain has been made by counsel and that Appellant, after being fully apprised of the terms thereof agreed to enter a plea of guilty. Thereafter, the prosecution requested, through Appellant's attorney that Appellant give a statement as to what actually occurred and how he took the money and

used it. The confession was given by Appellant in the presence of his counsel and others."

After taking notice of all these facts, the Court of Appeals still came to the conclusion that the defendant's statement was inadmissible, more specifically the court said at p. 927:

"Our concern is with the failure of the State and District Courts to recognize the confession was given as a result of the plea bargain and was therefore involuntary under all the circumstances. It is our conclusion that, since the plea bargain was not executed, the confession was involuntary and inadmissible.

The *Mobley* case *supra*, and the instant case have many similarities. In *Mobley*, the defendant not only was advised of and waived his *Miranda* rights, but he did so in the presence of counsel. Respondent in this case did not have counsel present when he gave up his *Miranda* rights.

The recent decision in *Gunsby* v *Wainwright*, 596 F2d 654 (1979) *cert den* 444 U.S. 946; 100 S Ct. 307; 62 LEd 2d 315 (1979) is of significance here. The factual similarity between the instant case and *Gunsby* in striking. In *Gunsby*, the defendant was promised a maximum sentence of 7½ years in prison and no objection to probation. In return, therefore, *Gunsby* agreed to enter a guilty plea and/or testify against two co-felons. Pursuant to the plea agreement, *Gunsby* gave a statement incriminating himself and one of his confederates. On *habeas corpus*, the court, per Roney, J., found that *Gunsby's* promise-induced confession should have been excluded from his Florida State trial.

In the case at bar, the Circuit Court and the Court of Appeals below held that the respondent's statement was admissible as a voluntary confession under the totality of the circumstances. (Appendix 32a-44a; 28a-31a) Their conclusions are founded upon the fact that respondent initiated the inquiry as to what sort of a deal he could obtain if he

helped police clean up the unsolved murder at the Hockstad Pharmacy. Petitioner asserts that since respondent *initiated* the bargaining session he should not be allowed to take back his confession when he refused to abide by the terms of said bargain. Respondent maintains, however, that since the confession attributed to him was the result of promises of the police and prosecutor his confession is *per se* inadmissible as a matter of constituitional law under the *Bram* decision and its progeny.

Under the facts of this case and the better reasoned decisions in this country, Respondent submits that the Michigan Supreme Court's resolution of the issue presented in his favor should persuade this Honorable Court to deny Petitoner's request for certiorari to the Supreme Court of the State of Michigan.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court will deny the State of Michigan's Petition for a Writ of Certiorari to the Supreme Court of Michigan.

Respectfully submitted,
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